A

AMMERCHANT BANK BHD

v.

TOTALHILL SDN BHD & ANOTHER CASE

B

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[CIVIL SUITS NOS: MT(1) 22-20-2006 &
MT(4) 22-798-2005]
27 MAY 2008

C

[2008] 1 CLJ JT(1)

LAND LAW: *Charge - Foreclosure - Order for sale - Rights of chargee - Whether entitled to exercise remedies concurrently against chargor/guarantor to recover monies due and owing - Whether must first exhaust*

D

remedy under foreclosure proceedings - Liability of chargor/guarantor - Whether would only arise if there was deficit in sum realised from sale of charged property - National Land Code, s. 256

LAND LAW: *Charge - Foreclosure - Order for sale - Rights of chargee - Action in personam against chargor/guarantor pending completion of*

E

foreclosure proceedings - Application for stay of proceedings - Whether action premature - Liability of chargor/guarantor - Whether unascertainable pending sale of charged property - Special circumstances - Consideration of Low Lee Lian v. Ban Hin Lee Bank Berhad

F

CIVIL PROCEDURE: *Stay of proceedings - Foreclosure - Order for sale - Chargee proceeding with action in personam against chargor/guarantor pending completion of foreclosure proceedings against charged property - Whether action premature - Whether special circumstances existed to warrant stay*

G

The plaintiff bank herein had granted loans to Totalhill Sdn Bhd ('borrower') on the security of a third party charge executed by Abdul Rashid Salleh Sdn Bhd ('second defendant') and a guarantee executed by one Tan Tuan Sing ('first defendant').

H

Upon default, the plaintiff sued the defendants, and subsequently also the borrower, *vide* Johore Bahru High Court Civil Suits Nos. MT(4) 22-798-2005 and MT(1) 22-20-2006 respectively. Pending disposal thereof, the plaintiff further instituted foreclosure proceedings against the second defendant in the High Court at

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Kuantan – and obtained an order for sale of the security as well as a consent order to sell the same at public auction for RM17.96 million. It was common ground that if the security was auctioned

off as scheduled, the sums realised would more than repay the RM6,938,373.24 owing to the plaintiff. The plaintiff, however, did not pursue the foreclosure proceedings to its ultimate end, and the charged lands, hence, remained unsold. The defendants argued that upon the obtaining facts it was unjust of the plaintiff to have prosecuted the Johore Bahru suit against them, and in the circumstances, *vide* encls. 28 and 52 herein, applied for that suit to be stayed pending the auction sale of the charged lands. It was the first defendant's stand that, as a guarantor, his obligation was contingent upon the primary liability of the borrower, and that he ought to be discharged from such obligation should the borrower be excused from liability following the sale. Likewise, the second defendant chargor maintained that it was neither the borrower nor the guarantor, and that its liability, if at all, would only crystalise if there is a shortfall after the charged lands had been auctioned. The plaintiff retorted that it was entitled to exercise all remedies concurrently against the parties, citing in support thereof the contractual provisions in the charge agreements and the authority of *Low Lee Lian v. Ban Hin Lee Bank Berhad*, among others. Before the learned Judicial Commissioner, the primary issues that arose were: (i) whether special circumstances existed as to justify the court to grant stay; and (ii) whether pending the disposal of the foreclosure proceedings herein, the plaintiff was barred from pursuing actions *in personam* against the first and second defendants.

Held (allowing stay):

(1) The court accepts that the plaintiff may pursue any or all remedies to recover monies lent by it. The plaintiff may indeed enforce its statutory charge against the chargor by way of foreclosure proceedings under s. 256 of the National Land Code, and either concurrently, simultaneously, contemporaneously or successively pursue actions *in personam* against the first defendant guarantor and the second defendant chargor. However, in *Low Lee Lian*, the Supreme Court also held that "Thus, **absent any special circumstances,** a chargee who has obtained an order for sale is not barred by *res judicata* or any other form of estoppel from pursuing actions *in personam* against the chargor or the surety". (para 11)

(2) In the present case, there is a pending application for summary judgment against the defendants. Further: (i) the plaintiff has already obtained the order for sale of the charged lands at the reserve price of RM17,960,000 and what remains is for the property to be sold at a public auction in order for the amounts owing under the charge to be settled; (ii) no affidavit evidence was adduced as to the present status of the auction process and it was also not shown why the auction could not be proceeded on promptly; (iii) *prima facie*, the realisation of the charge would more than repay the amounts owing to the plaintiff; (iv) the plaintiff failed to show that it would stand prejudiced if the application for stay is allowed, and even if it would, there was nothing to show that it could not be compensated by costs; and (v) there is great force in the Federal Court's decision in *Ng Yik Seng & Anor v. Perwira Habib Bank Malaysia Bhd* that in circumstances such as these, a stay (or even dismissal) of proceedings ought to be granted. All these constitute 'special circumstances' within the meaning of *Low Lee Lian* thereby justifying a stay of the proceedings against the first and second defendants. (para 12)

(3) Flowing from the decision in *Hongkong & Shanghai Banking Corp Ltd v. Wan Mohd bin Wan Ngah,* it would follow that the cause of action against the second defendant chargor as regards its personal liability would only accrue after the differential amount has been ascertained, ie. after the charged lands have been sold. This is premised on the charge annexure which provides for two separate causes of action, namely the foreclosure action under the National Land Code (action *in rem*), and the action *in personam* against the chargor which only arises after the foreclosure action. Be that as it may, it is the court's finding that in the circumstances of this case, the cause of action *in personam* against both the first and second defendants have not arisen as the foreclosure proceedings have not yet been completed. Owing to the charged lands remaining unsold at this point of time, the cause of action is at this stage premature since the differential amount between the amount owing and the amount realised from the sale of the charged lands cannot be ascertained. (paras 16-19)

Case(s) referred to:

Bank Bumiputra (M) Bhd v. Esah Abdul Ghani [1985] 2 CLJ 409; [1985] CLJ (Rep) 41 SC ***(refd)***

Hongkong & Shanghai Banking Corp Ltd v. Wan Mohd Wan Ngah [1991] 1 CLJ 821; [1991] 2 CLJ (Rep) 732 HC ***(foll)***

Hongkong Bank Malaysia Bhd v. Wexcel Holdings Sdn Bhd & Ors [2004] 8 CLJ 252 HC ***(foll)***

Kandiah Peter Kandiah v. Public Bank Bhd [1993] 4 CLJ 332 SC ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Berhad [1997] 2 CLJ 36 SC ***(dist)***

Mayban Finance Bhd v. Yau Jiok Hua & Anor [2007] 7 CLJ 609 HC ***(foll)***

Ng Yik Seng & Anor v. Perwira Habib Bank Malaysia Bhd [1980] 1 LNS 52 FC ***(foll)***

Tan Kong Min v. Malaysian National Insurance Sdn Bhd [2005] 3 CLJ 825 FC ***(foll)***

Legislation referred to:

National Land Code, ss. 256, 260

Other source(s) referred to:

Paget on Banking, *8th edn, p 618*

For the plaintiff - LC Neoh; M/s Tay & Partners

For 1st defendant - Dr Wong Kim Fatt (YK Tee with him); M/s Gulam & Wong

For the 2nd defendant - SW Ong; M/s Andrew-David Wong & Ong

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] By a summons in chambers (encl. 28), the 1st defendant is applying for a stay of all proceedings herein against the 1st defendant until the final disposal of the foreclosure proceedings against the charged land in the High Court at Kuantan *vide* Originating Summons No. MT(2) 24-70-2006 ('the charge action') between AmMerchant Bank Bhd (23742-V) as plaintiff ('the plaintiff') and Abdul Rashid Salleh Sdn. Bhd. (084504-X) (the 2nd defendant herein) as the defendant. By a summons in chambers (encl. 52) the 2nd defendant is also applying for a stay of the abovementioned proceedings. Both applications for stay were heard together. Accordingly, the term 'the defendants' application' shall mean both the 1st and 2nd defendant's respective applications for stay.

Background Facts

[2] At the hearing of the charge action at the High Court at Kuantan the plaintiff was granted an order for sale of the charged lands. Subsequently, on 10 May 2007 the plaintiff/chargee entered into a consent order (exh. T2, encl. 32) with the 2nd defendant/chargor for, *inter alia*, the charged lands to be sold at public auction in the High Court at Kuantan on 26 July 2007 at the reserve price of RM17,960,000. As at the date of the hearing of the defendants' application the charged lands have not been auctioned and no new auction date has yet been fixed. In this suit the 1st defendant is being sued in his capacity as a guarantor and the 2nd defendant in its capacity as the landowner/chargor. In this application there are only two principal issues of contention.

First Issue

[3] Learned counsel for the 1st defendant submitted that it is just and convenient that the plaintiff proceed first to realise by public auction the sale of the charged lands in order to satisfy the outstanding sums owing to the plaintiff under the charge. Learned counsel relied on *Hongkong Bank Malaysia Bhd v. Wexcel Holdings Sdn Bhd & Ors* [2004] 8 CLJ 252. In that case summary judgment was obtained against the defendants. Pending the defendants' appeal to the Court of Appeal, the defendants filed an application for stay of execution. Here the plaintiff has also taken a foreclosure action to realise one of the securities. In granting the stay application Abdul Malik Ishak J (as he then was) said:

> Here, the plaintiff had also taken a foreclosure action in order to realise one of the securities as seen in Shah Alam High Court originating summons No MT4-24-328-2001. So, it would only be appropriate that the plaintiff ought to realise the said security before the plaintiff takes action against the guarantors – referring to the second and third defendants. It is said that there is a big possibility that the security realised would be sufficient to settle whatever amount owed and that would be based on the guidelines issued by Bank Negara.

[4] In this context the salient fact is that the loans granted by the plaintiff to the borrower is secured by a legal charge over the charged lands for which the order for sale has already been granted. The defendants have adduced affidavit evidence that the charged lands are valued at RM21,162,000 (exh. T1). The

plaintiff's claim against the defendants according to the statement of claim is for the principal amount of RM6,938,373.24 together with interest and costs. It is also common ground that the realisation of the charge would more than repay the amounts owing to the plaintiff.

[5] In *Ng Yik Seng & Anor v. Perwira Habib Bank Malaysia Bhd* [1980] 1 LNS 52 the plaintiff bank had granted an overdraft to a company, for which the defendants stood guarantee. The overdraft was secured by a charge on a piece of property. When the overdraft was not repaid, the plaintiff bank brought an action against the defendants. Subsequently the plaintiff applied for summary judgment. The plaintiff's application was allowed by the senior assistant registrar but her decision was reversed by the High Court which gave conditional leave to defend. The condition imposed was for the payment of RM125,000 into court. The defendants appealed and the plaintiff bank cross-appealed against the decision. In granting the defendants unconditional leave to defend the Federal Court stated that:

> *Prima facie*, therefore, the realisation of the charge would more than repay the overdraft. In these circumstances the appellants contended that "in law and in equity" they should only be called on to meet their guarantee if there should be any deficit after the sum to be realised from the sale of the charged property has been determined.
>
> This contention is not without attraction. We have not heard any substantial submissions at length on this point which was not ruled on in the court below, but while it is uncertain that the claim against the appellants in the circumstances of a charge is bad "in law and equity", it is, in our view, clear that in such circumstances an action to obtain judgment against the guarantors which would open avenues of execution to the chargee and even bring the guarantors in to the Bankruptcy Court when in the final accounting, the appellants needed not to be called to honour their guarantee, would be an abuse of the process of courts. Where the plaintiff had no substantial interest in the subject of the litigation, had suffered no damage which could not easily be rectified and the action was a useless piece of litigation, the court dismissed it: see *Webster v. Bakewell R.D.C. (No. 2)*. That was a case where the facts were present at the issue of the writ. *The present case may not be so but may well turn out to be effectively a case of, to echo the words used, a useless piece of litigation, so that a court may very well in the exercise of its discretion stay, not dismiss the action until after the completion of the sale of the property that has been charged to the Bank.*

A stay (or even dismissal) of proceedings may "often be required by the very essence of the justice to be done", per Lord Blackburn in *Metropolitan Bank v. Pooley*, so as to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation. (emphasis added)

[6] Learned counsel for the 1st defendant submitted that the 1st defendant being a guarantor, his liability is merely secondary. As a guarantor, the 1st defendant's liability is contingent upon the primary obligation, being the principal debtor's liability and ultimately his default. Thus, if the principal debtor is excused or his liability terminated, the guarantor is generally discharged from his secondary obligation. (see *Mayban Finance Bhd v. Yau Fiok Hua & Anor* [2007] 7 CLJ 609).

[7] In reply learned counsel for the plaintiff submitted firstly that the plaintiff is entitled to sue the 1st and 2nd defendants based on the contractual provisions in the agreements. Learned counsel for the plaintiff argued that the 1st defendant is one of the directors of the borrower and a guarantor of the banking facilities granted by the plaintiff. In this connection, reference was made to the following provisions of the facility agreements:

Section 11.01 Remedies

Upon default in the manner hereinbefore provided, the Lender's remedies shall include, but are not limited, to the following:

(a) the right to institute legal proceedings by way of civil suit or otherwise against the Borrower and/or all of the Security Parties;

Section 2.01 Definitions

In this Instrument, the following words and expressions shall have the following meanings:

(u) "the Security Parties" means the Chargor, the Guarantor, and any other person or persons providing security to the Lender in respect of the Facilities;

Section 11.03 Concurrent Actions

Notwithstanding any provision herein contained, upon default or breach by the Borrower of any term, covenant, stipulation or undertaking herein provided and on the part of the Borrower to be observed and performed, the Lender shall thereafter have the right to exercise all or any of the rights or remedies available

whether under this Instrument, the Security Documents or by statute or otherwise and shall be entitled to exercise such rights or remedies concurrently against the Borrower and/or the Security Parties to recover all monies due and owing to the Lender.

[8] Learned counsel for the plaintiff also submitted that under the terms of the guarantee and indemnity dated 6 May 1996 (exh. AMB3 in encl. 10) the guarantee shall be in addition to any other guarantee or other security for the borrower held by the lender. Accordingly, it was submitted that the plaintiff is entitled to sue the 1st defendant on the guarantee provided in addition to the enforcement of the security provided by the chargor in the foreclosure proceedings at the Kuantan High Court.

[9] In respect of the 2nd defendant, learned counsel for the plaintiff submitted that based on the two charge annexures (exhs. AMB4 and AMB10 in encl. 10) read together with the two facility agreements (exhs. AMB2 and AMB8) the 2nd defendant/chargor has agreed that the plaintiff is entitled to exercise all its remedies concurrently against the borrower and/or the chargor to recover all monies due and owing to the plaintiff. Reference was made to s. 11.01 of the charge annexures and s. 11.01(a) and s. 11.03 of the facility agreements. Section 11.01(a) and s. 11.03 of the facility agreement have already been reproduced above. Section 11.01 of the charge annexure reads as follows:

Section 11.01 Remedies

Upon the occurrence of any default, the Lender shall be entitled to exercise all or any of the remedies provided in the Facility Agreement, this Charge, the other Security Documents or by statute or otherwise and shall be entitled to exercise such remedies concurrently against the Borrower and/or the Chargor to recover all monies due and owing to the Lender.

[10] In further support of the above contention learned counsel for the plaintiff cited *Low Lee Lian v. Ban Hin Lee Bank Berhad* [1997] 2 CLJ 36, *Kandiah Peter Kandiah v. Public Bank Bhd.* [1993] 4 CLJ 332 and *Bank Bumiputra (M) Bhd. v. Esah Abdul Ghani* [1985] 2 CLJ 409; [1985] CLJ (Rep) 41. In *Low Lee Lian* the Supreme Court held that:

Now it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings *in rem* under s. 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant

A contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively. See, *China and South Sea Bank Ltd. v. Tan* [1989] 3 All ER 839, 842.

B In *Kandiah Peter* the Supreme Court held that at p. 334:

> A chargee who makes an application for an order for sale in foreclosure under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default.

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And in *Esah Abdul Ghani* at p. 44 the Supreme Court citing *Paget on Banking*, 8th edn, p. 618 stated:

> On the contrary, the right to sue the guarantor without resorting
D to the securities is clearly recognised by Lord Selborne, and by Lord Blackburn. In the Scottish case of *Ewart v. Latta* [1865] 4 Marq. 983 @ p. 987 Lord Westbury says:
>
> Until the debtor has discharged himself of his liability, until he has fulfilled his own contract, he has no right to dictate any terms, to
E prescribe any duty, or to make any demand on his creditor. The creditor must be left in possession of the whole of the remedies which the original contract gave him, and he must be left unfettered and at liberty to exhaust those remedies, and he cannot be required to put any limitation upon the course of legal action
F given by him by his contract by any person who is still his debtor, except upon the terms of that debt being completely satisfied.

[11] This court accepts that the plaintiff may pursue any or all remedies to recover monies lent by it. The plaintiff may, indeed
G enforce its statutory charge against the chargor by way of foreclosure proceedings under s. 256 NLC and either concurrently, simultaneously, contemporaneously or successively pursue actions *in personam* against the 1st defendant/guarantor and the 2nd defendant/chargor. However, in *Low Lee Lian*, the Supreme Court
H also held at p. 56 that:

> Thus, **absent any special circumstances**, a chargee who has obtained an order for sale is not barred by *res judicata* or any other form of estoppel from pursuing actions *in personam* against the chargor or the surety. (emphasis added)

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[12] In the present case there is a pending application for summary judgment against the defendants. The plaintiff has already obtained (i) the order for sale of the charged lands and (ii) a consent order for the charged lands to be sold at public auction in the High Court at Kuantan on 26 July 2007 at the reserve price of RM17,960,000. No affidavit evidence was adduced by the plaintiff as to the present status of the auction process. In fact, what remains is only for the charged lands to be sold at a public auction in order for the amounts owing under the charge to be settled. The plaintiff has not shown why the auction ought not in the ordinary course of events to proceed promptly. *Prima facie*, the realisation of the charge would more than repay the amounts owing to the plaintiff. Furthermore, the plaintiff failed to show or prove that it will be prejudiced if the defendants' application for a stay is allowed. Even if the plaintiff would be prejudiced there was nothing to show that it could not be compensated by costs. There is also great force in the Federal Court's decision in *Ng Yik Seng & Anor v. Perwira Habib Bank Malaysia Bhd (supra)* that in circumstances such as these a stay (or even dismissal) of proceedings may often be required by the very essence of the justice to be done. In my view the circumstances described above constitute special circumstances within the meaning of the *Low Lee Lian* thereby justifying a stay of the proceedings against the 1st and 2nd defendants.

Second Issue

[13] Learned counsel for the 2nd defendant further submitted that the 2nd defendant is the landowner/chargor who provided the charge lands as security for the loans granted by the plaintiff to the borrower Totalhill Sdn. Bhd. Therefore, the 2nd defendant is neither the borrower nor the guarantor. The charge in question is a third party charge. Accordingly, it was submitted that the 2nd defendant's liability, if any, is founded on the charge documents. Accordingly it was submitted that the 2nd defendant's liability crystallises only if there is still a shortfall after the charged lands have been auctioned. Learned counsel submitted that this is consistent with the provisions of s. 11.04 in the charge annexure which reads as follows:

Section 11.04 Deficiency in Monies Realised

> If the amount realised pursuant to the exercise of the remedies conferred by the Facility Agreement, this Charge, the other Security Documents or by statute of otherwise on the Lender, after deduction and payment of all costs charges and expenses, is less than the amount due to the Lender; and whether at such realisation the Lender is the purchaser of the assets or otherwise the Chargor shall pay to the Lender the difference between the amount due and the amount so realised and until payment shall be entitled to recover the same with interest thereon at the Prescribed Rates of Interest or any other rates determined by the Lender.

[14] In *Hongkong & Shanghai Banking Corp Ltd v. Wan Mohd bin Wan Ngah* [1991] 1 CLJ 821; [1991] 2 CLJ (Rep) 732 the plaintiff bank had granted a housing loan to the defendant upon the security of the land which was charged to the plaintiff bank. Due to the defendant's default the plaintiff bank applied for and obtained an order for sale of the land to realise the money owing in the sum of RM290,873.56. The plaintiff bank also filed a writ of summons claiming the amount due. The question before the court was whether the plaintiff bank being also the chargee of the land was entitled at law and in equity to proceed by way of a civil suit before first realising the security under the charge and if so, whether the plaintiff bank was entitled to proceed concurrently on all its remedies. In answering the said question, Lamin J (as he then was) examined the charge annexure and in particular cl. 8 (which is similar to s. 11.04 above) held at p. 736 (Rep):

> If the amount realised by the chargee on the sale of the charged land is less than the amount due to the chargee, the chargor shall pay to the chargee the difference between the amount due and the amount so realised. So the personal liability of the chargor is only to the extent of the amount due (cl 8). It is quite clear that upon reading the annexure as a whole both the chargee and the chargor are bound by the terms and conditions of the charge and to realise the amount owing, the land must be sold in accordance with the provisions of the National Land Code 1965 ('NLC'). If the amount realised from the sale is not sufficient to cover the amount due then it is implied that a separate action may be taken against the debtor/chargor to recover the balance should he fail to pay the chargee the difference.

And further at p. 737 (Rep): A

I am further fortified by the proposition enunciated in the case of *Williams v. Hunt* and in the words of Collins MR (at p 514):

> Where two separate remedies are possible, and a start is made by putting in force of those remedies by a writ which would entitle the plaintiff to the relief he subsequently desires, he cannot be deliberately leaving that out of his claim reserve his right to ask for it in another proceeding. Where proceedings have been started, it is an abuse of the process of the court to divide the remedy where there is a complete remedy in the court in which the suit was first started.

B C

In that case, the facts were that the defendant was a lessee of certain premises which he mortgaged by deed of 28 March 1901, to the plaintiff as security for a loan of £400. The mortgaged deed contained a provision for the repayment of the principal by quarterly instalments. In May 1924 an action was commenced by writ issued in the chancery division by the plaintiff as mortgagee. Before the case was heard, the plaintiff issued a specially indorsed writ in the King's Bench Division by which she claimed 416l 17s 2d for principal and interest. Then the defendant applied for a stay of proceedings in the Kings Bench Division on the ground that the whole cause of action was the subject of the action pending in the chancery division. So it was decided that it was an abuse of process of the court to allow the proceeding before the King's Bench Division when a complete remedy could have been obtained in the chancery division. Certainly this was good policy as this could help to discourage litigants from knocking at the door of every court when the process in the first court had not been completed. In the case before me, the foreclosure proceedings were before the Land Administrator as it was a Land Office title that was the subject matter of the proceedings (s. 260 NLC). Under the NLC, if the subject matter of the foreclosure is a registry title, then the High Court will be the tribunal that will dispose of the application for the foreclosure action (s. 256 NLC). In our case, the Land Administrator is a competent tribunal under the law where the plaintiff bank can obtain a complete remedy, and to allow the plaintiff to file an action before another tribunal, in this case, the High Court, where the earlier proceedings has not even been completed before the Land Administrator, must, to my mind, be also treated as a case of abuse of process of the process of court. The foreclosure action is complete upon the sale of the land and should there be a shortfall after recovery of the amount due from the sale price, cl. 8 is immediately attracted in

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that the chargor 'shall' make good the difference. Whether the chargor in that event will or will not comply is not in issue for the determination of what is a 'complete remedy'.

[15] In the result, Lamin J (as he then was) answered the question in the negative and ordered that the present suit be stayed. In the present case, the civil suit against the defendants was instituted in 2005. Pending the disposal of the civil suit, the plaintiff took out an originating summons at the Kuantan High Court in 2006 applying for an order for sale. The order for sale was subsequently granted. Both actions taken by the plaintiff are founded on the charge. Before me, it was accepted by counsels for both the plaintiff and the defendants that upon the completion of the foreclosure proceedings the proceeds realised would be more than sufficient to settle the amount owing to the plaintiff. Here, notwithstanding that the civil suit was instituted earlier, the foreclosure proceedings though instituted later had, as it were, overtaken the civil suit when the plaintiff obtained the order for sale. In fact the plaintiff went a step further towards completing the foreclosure proceedings when it recorded the consent order (exh. T2) with the 2nd defendant for, *inter alia*, the charged lands to be sold at public auction sale in the Kuantan High Court at the reserve price of RM17,960,000.

[16] Flowing from the decision in *Hongkong & Shanghai Banking Corp Ltd v. Wan Mohd bin Wan Ngah (supra)* it would follow that the cause of action against the 2nd defendant as chargor as regards its personal liability would only accrue after the differential amount has been ascertained, ie, after the land has been sold. This is premised on the charge annexure which provides for two separate causes of action. The first is statutory in nature, ie, the foreclosure action under the National Land Code 1965 (action *in rem*) whilst the second only arises after the foreclosure action, ie, the action *in personam* against the chargor.

[17] In this regard it is pertinent to refer to the more recent decision of the Federal Court in *Tan Kong Min v. Malaysian National Insurance Sdn Bhd* [2005] 3 CLJ 825. The brief facts are as follows. In 1984 by way of security, the appellant created a first legal charge over his land in favour of the respondent ('MNI'). The appellant defaulted in payment of its loan in 1986. MNI then foreclosed the land by way of a public auction on 16 March 1992. The land was sold for RM80,100 leaving a balance of RM336,012.52 still due and owing from the appellant

to MNI. Pursuant to cl. 7 of the Annexure to the charge, the appellant, as chargor, had agreed that he shall pay to MNI the difference between the amount due and the amount realised from the sale and, until such payment, will also pay interest on the balance due at the prescribed rate with monthly rests. Relying on cl. 7 of the Annexure to the charge, MNI had through their solicitors demanded for the principal sum and interest remaining due from MNI. The appellant failed to make payments of the amount demanded resulting in the commencement of a suit *vide* MNI on 17 January 2005. MNI's claim was dismissed by the learned judicial commissioner. MNI's appeal to the Court of Appeal was allowed. Dissatisfied with the Court of Appeal's decision, the appellant posed certain questions for the determination of the Federal Court. It is instructive to note what the Federal Court had to say at p. 836:

> In the circumstances of the present appeal before us, we are of the view that the point in time where all the material facts are said to be in existence to render the cause of action complete would be after the sale has been conducted and the differential amount remaining due to the respondent has been ascertained.
>
> Therefore, the earliest possible date the respondent could bring an action against the appellant for breach of his personal covenant under cl. 7 is on 16 March 1992, being the date the property was sold by auction.
>
> Since the respondent's cause of action arose on 16 March 1992, their action against the appellant which was filed on 17 January 1995, was filed well within the time prescribed in s. 21(1) of the Act, i.e. 12 years.

And at p. 837:

> This would therefore mean that the cause of action against the appellant as chargor as regards his personal liability in the present appeal will only accrue after the differential amount has been ascertained, i.e. after the land had been sold.
>
> In short, the contractual provisions of the Annexure to the charge provides for two separate causes of action. The first is statutory in nature, i.e. the foreclosure action under the National Land Code a965 (action *in rem*). The second which arises only after the foreclosure action (and if there is still a surplus owing) is the action in personal against the chargor.

The decision of Lamin J (as he then was) in *HSBC*'s case was also followed by Haidar J (as he then was) in *Leong Yick Realty Co Sdn Bhd v Asia Commercial Finance (M) Sdn Bhd* [1994] 2 MLJ 308 where his Lordship held (at p 838):

> In any event, as the debt is disputed by the plaintiff, the defendant should proceed by way of a separate action against the plaintiff to recover for the shortfall. In fact, the case of the *Hongkong & Shanghai Banking Corp Ltd v. Wan Mohd bin Wan Ngah*, relied on by counsel for the defendant would seem to support that a separate action need to be taken against the plaintiff to recover the shortfall.
>
> At the risk of repetition, we would reiterate that the personal liability of the appellant as chargor is in respect of the difference between the amount due under the housing loan and the amount realised from the sale of the said land only and the cause of action against the appellant is only complete upon the conclusion of the sale of the said land. Indeed, if a suit is brought against the chargor before the completion of the foreclosure action and the determination that there is still a balance still owing, such a suit should be struck off as being premature.

[18] Applying the principles enunciated in the authorities cited above to the facts of this case, it is clear that the plaintiff's action against the 2nd defendant is premature and may be struck off on that ground alone. Having obtained the order for sale it cannot be said that the foreclosure proceedings have been completed. Indeed, pending the sale of the charged lands by public auction, the foreclosure proceedings are still incomplete. The personal liability, if any, of the chargor under the charge remains unascertained so long as it is impossible to determine the differential amount until after the charged land have been sold. In the circumstances of the present case, the point in time when all the material facts may be said to be in existence so as to render the cause of action complete would be after the sale of the charged lands has been concluded and the differential amount remaining due to the plaintiff has been ascertained.

[19] In conclusion, it is this court's finding that on the first issue special circumstances exist within the meaning of the exception in *Low Lee Lian* so as to justify a stay of the proceedings against the 1st and 2nd defendants. In regard to the second issue, it is the court's finding that in the circumstances of the present case the cause of action in personam against the 1st and 2nd defendants

have not arisen as the foreclosure proceedings have not yet been completed. Owing to the charged lands remaining unsold at this point in time, the cause of action herein is at this stage premature since the differential amount between the amount owing to the plaintiff and the amount realised from the sale of the charged land cannot be ascertained. For the foregoing reasons, the defendants' applications for stay of proceedings are allowed with costs.